

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MICHAEL WITTENBERG and)	
DEBBIE WITTENBERG, on behalf)	
of their son, J.W., as well)	
as on their own behalf,)	
)	
Plaintiffs,)	
)	
v.)	1:05CV00818
)	
WINSTON-SALEM/FORSYTH COUNTY)	
BOARD OF EDUCATION, a/k/a)	
Winston-Salem/Forsyth County)	
Schools,)	
)	
Defendant.)	

ORDER

This matter is before the court on Defendant's Answer, Response and Defenses to Amended Complaint and various subsequently filed motions and responses. Defendant, in its Answer, Response and Defenses to Amended Complaint, requests that the court dismiss Plaintiffs' First Amended Complaint under Federal Rule of Civil Procedure 12(b)(6) and, alternatively, asks the court to strike the document pursuant to Rules 15(a) and 12(f), because the amended complaint is materially different from the proposed amended complaint which accompanied Plaintiffs' Second Motion to Amend. Plaintiffs responded to Defendant's requests, and Defendant further responded, requesting clarification on whether Plaintiffs' response was properly filed. The court finds that Defendant's requests under Rules 12(b)(6),

15(a), and 12(f) are motions pursuant to Federal Rule of Civil Procedure 7(b), and therefore, Plaintiffs' response to those motions was properly filed.¹ Because the court will rule on Defendant's motions in this order, no further responses or pleadings need to be filed at this time.

The court further finds that Plaintiffs' First Amended Complaint is materially different from Plaintiffs' proposed amended complaint. However, Plaintiffs' First Amended Complaint substantially complies with the motion to amend which the court granted in the Memorandum Opinion and Order of July 11, 2006. Although Plaintiffs should not have made material changes to the proposed amended complaint before filing it, the court will not dismiss or strike an amended complaint that it has allowed. Therefore, the court will grant Plaintiffs 20 days to file a second amended complaint, which sets forth only those amendments requested in Plaintiffs' Second Motion to Amend, as reflected in the proposed amended complaint.

IT IS ORDERED that Defendant's motions to dismiss Plaintiffs' First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and to strike the same under Rules 15(a)

¹ Local Rule of Civil Practice 7.3 requires that motions "be in writing and . . . accompanied by a brief" and that "[e]ach motion . . . be set out in a separate pleading." LR7.3(a). In setting forth motions to dismiss and strike Plaintiffs' amended complaint in Defendant's answer and not in a separate pleading accompanied by a brief, Defendant violated Local Rule 7.3. However, because Defendant's motions satisfy the requirements of Federal Rule of Civil Procedure 7(b), this court will consider Defendant's requests as motions.

and 12(f), found within Defendant's Answer, Response and Defenses to Amended Complaint, are DENIED.

IT IS FURTHER ORDERED that within 20 days of the entry of this order, Plaintiffs should file a second amended complaint which includes only the amendments set out in the proposed amended complaint accompanying Plaintiffs' Second Motion to Amend, as granted in this court's Memorandum Opinion and Order filed July 11, 2006.

This the 9th day of January 2007.


United States District Judge